Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. N. v. Minister of Employment and Social Development*, 2017 SSTADIS 160

Tribunal File Number: AD-16-408

BETWEEN:

J. N.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: April 12, 2017

REASONS AND DECISION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated December 16, 2016, which determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable.

[2] The only grounds of appeal to the Appeal Division are those identified in s. 58(1) of the *Department of Employment and Social Development Act* (DESDA):

a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[3] Pursuant to s. 56(1) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[4] The leave to appeal proceeding is a preliminary step to an appeal on the merits. It is an initial and appreciably lower hurdle to be met; the Applicant does not have to prove the case at the leave stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). Rather, the Applicant is required to establish that the appeal has a reasonable chance of success, on at least one of the permissible grounds in s. 58(1) of the DESDA. This means having, at law, some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115, *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. The Appeal Division should not weigh the evidence at the leave stage, or dispose of the case on the merits; leave should be granted unless the Appeal Division concludes that no one could reasonably believe in the appeal's success: *Canada (Procureur général) c. Bernier*, 2017 CF 120. Similarly, Tribunal decisions have

equated “no reasonable chance of success” with an appeal that is “utterly hopeless” or “bound to fail” (see, for example, *R. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1190 and *S. R. v. Canada Employment Insurance Commission*, 2016 SSTADEI 25).

[5] In his reasons for leave to appeal, Applicant’s counsel first submits that the General Division did not properly consider whether the Applicant (then Appellant) had work capacity as required by *Inclima v. Canada (Attorney General)*, 2003 FCA 117, raising possible errors of law and fact under ss. 58(1)(*b*) and (*c*) of the DESDA.

[6] The General Division’s finding regarding work capacity is material to the determination that the Applicant did not have a severe disability by the end of his minimum qualifying period (MQP). The member determined that the Applicant, “with proper treatment for his physical condition, has the capacity for some type of suitable work within his limitations.” The member did not clearly show what evidence he had relied upon in coming to this conclusion, nor did he explain the test he had applied to determine work capacity. This raises an arguable case with respect to a potential error of law and/or fact, which ought to be fully explored on the merits of this appeal. It cannot be said, at this stage, that no one could reasonably believe in the appeal’s success, or that the appeal is bound to fail.

[7] Having found that there is an arguable case in respect of the Applicant’s first submission, I need not consider any other grounds that the Applicant has raised, at this time. Subsection 58(2) does not require that individual grounds of appeal be considered and accepted or rejected: *Mette v. Canada (Attorney General)*, 2016 FCA 276. The Applicant is not restricted in his ability to pursue the grounds raised in his application for leave to appeal.

[8] I understand that Applicant’s counsel claims a second error of law, in relation to the General Division’s application of *Villani v. Canada (Attorney General)*, 2001 FCA 248. It is unclear to me whether Applicant’s counsel also claims that the General Division made reviewable errors of fact, pursuant to s. 58(1)(*c*), in respect of the list of 12 items in the leave application. If so, he is invited to clarify in his submissions the specific findings of fact, their materiality, and the basis for his claim that the findings were erroneous and made in a perverse or capricious manner or without regard for the evidence.

CONCLUSION

[9] The application for leave to appeal is granted.

[10] This decision does not presume the result of the appeal on the merits of the case.

Shirley Netten
Member, Appeal Division